ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands	)	**ET Docket No. 95-183** **RM-8553**
	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz	)	**PP Docket No. 93-253**

REPLY COMMENTS OF AMERITECH CORPORATION

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SUMMARY

In the following reply comments, Ameritech Corporation ("Ameritech") continues to urge the Commission to resume processing all applications for fixed point-to-point microwave service in the 39 GHz band that were filed in accordance with the Commission's Rules prior to the November 13, 1995 processing freeze. As numerous commenters have demonstrated, Section 309(j)(6)(E) of the Communications Act of 1934, as amended (the "Act") requires the Commission to allow existing mutually exclusive applicants to resolve their conflicts voluntarily. This course is not only required by law, but it is supported by the vast majority of commenters to this proceeding and it is in the public interest. Ameritech agrees with comments filed by TIA suggesting that the Commission adopt a flexible build-out standard which is based upon service area population or population density. Ameritech also supports those commenters who believe any "give away" or set-aside of 37 GHz BTA channels, for PCS or other CMRS licensees, would be contrary to the public interest and lead to inefficient use of valuable spectrum. The FCC's channel plan should reserve a number of 37 GHz channels for point-to-point licensing to take advantage of the new conditional licensing process adopted with the new Part 101 rules. Nearly all commenters believe the Commission's rules for the 37 and 39 GHz bands should afford licensees with maximum technical and operational flexibility within their licensed service areas, so long as they do not cause interference to adjacent channel licensees or co-channel licensees in contiguous BTAs. Ameritech also agrees with commenters that support spectrum disaggregation and geographic partitioning rights.

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REPLY COMMENTS OF AMERITECH CORPORATION

Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, Ameritech Corporation ("Ameritech"), hereby submits its reply comments based on the record in the above-captioned proceeding.

I. SECTION 309 OF THE COMMUNICATIONS ACT REQUIRES THE COMMISSION TO GIVE MUTUALLY EXCLUSIVE APPLICANTS AN OPPORTUNITY TO RESOLVE THEIR CONFLICTS VOLUNTARILY

Ameritech supports the comments filed by Commco, L.L.C. ("Commco"), which demonstrate that Section 309(j)(6)(E) of the Communications Act of 1934, as amended (the "Act") requires the Commission to allow existing mutually exclusive applicants to resolve their conflicts voluntarily.[1/]

Section 309(j) of the Act confers the authority for the FCC to utilize competitive bidding to issue licenses. The Commission is restricted to utilizing competitive bidding procedures only when mutually exclusive applications are filed for subscription-based services. Subsection (j)(6)(E) of Section 309 further states that competitive bidding authority does not relieve the Commission its obligation "to continue to use engineering solutions, negotiation... and other means in order to avoid mutual exclusivity in application and

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[1/] Comments of Commco at 3.

licensing proceedings." 47 U.S.C. § 309(j)(6)(E). Therefore, even when mutually exclusive applications are filed, auctions should not automatically follow.

The Commission's 60-day public notice and cut-off filing procedures, and its practice of accepting multiple-channel applications, has created a complex "daisy chain" of interdependent filing windows. As a result, many 39 GHz applicants who filed in accordance with the rules did not have an opportunity to negotiate settlements of their mutual exclusivity. This is because the universe of competing applicants *could not be determined* prior to the Commission's November 13, 1995 freeze order ("*Freeze Order*"). Therefore, these applicants, as well as other applicants caught further up the chain of mutual exclusivity, must be allowed an opportunity by the Commission to remedy their mutual exclusivity through voluntary means before the available 39 GHz spectrum is scheduled for auction.

Moreover, the troubling nature of the Commission's 39 GHz *Freeze Order* was recognized by Senators Pressler and Daschle, who together expressed their concern about the Commission's treatment of its auction authority and processing of 39 GHz applications. The Senators reminded the Commission that it was still under an obligation to "make every effort to avoid mutually exclusive application situations."[2/] They further clarified Congress' intent embodied in Section 309 by stating that "the promotion of more competitive services for the public and more efficient use of spectrum were of paramount importance compared to allocation by competitive bidding."[3/]

[2/] Letter of February 9, 1996, from Sens. Pressler and Daschle to FCC Chairman Reed E. Hundt, Comments of Commco, Appendix 1.

[3/] *Id.*

It would therefore be contrary to the law and patently unfair for the Commission to ignore the Congressional mandate of avoiding mutual exclusivity, and to instead dismiss any mutually-exclusive applications that were filed in accordance with the Commission's policies and rules. The Commission should avoid the unnecessary delays in licensing the 39 GHz channels that will be created by its retroactive application of the 39 GHz processing freeze, and the potential for protracted litigation which is sure to follow. Therefore, allowing mutually exclusive 39 GHz applicants to file minor amendments and settlement agreements is consistent with the public interest and the Commission's auction authority. The Communications Act mandates that the Commission take steps to *avoid* mutual exclusivity, not create more of it.

II. THE RECORD DEMONSTRATES THAT THE COMMISSION SHOULD CONTINUE PROCESSING OF ALL PENDING 39 GHz APPLICATIONS

There is near unanimous support among the commenters for the Commission to resume processing *all* of the 39 GHz applications it received prior to the *Freeze Order*, in accordance with the rules in effect when these applications were filed. Such an approach not only protects the substantial investment made by current applicants, including Ameritech, but is consistent with settled principles of administrative law and notions of fairness.

Eleven out of the twelve commenters that addressed the treatment of pending mutually exclusive applications in the 39 GHz band supported the continued processing of these applications. Along with Ameritech,[4/] these commenters represent a broad cross-section of the telecommunications industry including PCS and CMRS licensees,[5/] equipment

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[4/] *See* Comments of Ameritech at 3.

[5/] *See* Comments of AT&T Wireless Services ("AT&T") at 2.

manufacturers[6], entrepreneurs and other microwave service providers.[7] Continued processing of all 39 GHZ applications was also supported by the Telecommunications Industry Association ("TIA").[8]

A number of commenters agreed with Ameritech's showing that retroactive application of the freeze and the auction scheme to already-filed applications would be improper and adverse to the public interest.[9] Senators Pressler and Daschle likewise indicated that "it seems anomalous to the clearly expressed intent of Congress within the Act that applicants who have completed the application process would subsequently be exposed to having to compete for that spectrum in auctions."[10] Therefore, the Commission should eliminate the retroactive aspects of its freeze and auction proposals.

Only *one* commenter urges the Commission not to process the pending applications.[11] GTE proposes that the Commission: (1) dismiss the pending 39 GHz applications that it is holding in abeyance and open a new application filing window for such frequencies and licensing areas; or (2) retain those applications on file and permit other interested parties to file competing applications that will be processed pursuant to an adopted competitive bidding

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[6] *See* Comments of GHz Equipment Co., Inc. ("GHz Equipment") at 5; Comments of Digital Microwave Corporation ("DMC") at 2; Comments of Harris Corporation ("Harris") at 2; Comments of Alcatel Network Systems ("Alcatel") at 2.

[7] *See* Comments of Sintra Capital Corporation ("Sintra") at 2; Comments of Commco, L.L.C. ("Commco") at 3; Comments of Bachow And Associates ("Bachow") at 5; Comments of No Wire, L.L.C. ("No Wire") at 7; Comments of Telco Group, Inc. ("TGI") at 13.

[8] *See* Comments of TIA at 12.

[9] *See, e.g.* Comments of Bachow at 6, Comments of TIA at 11, Comments of Commco at 3.

[10] Letter of February 9, 1996, from Sens. Pressler and Daschle to FCC Chairman Reed E. Hundt, Comments of Commco, Appendix 1.

[11] *See* Comments of GTE Service Corporation ("GTE") at 7.

policy and corresponding rules for 39 GHz authorizations."[12/] However, GTE offers no legitimate justification for either of its novel suggestions, which are blatantly unfair to existing applicants and based on the incorrect assumption that *none* of them have a serious intent to implement service to the public pursuant to the granted authorizations. GTE's proposal is essentially asking the Commission "to throw out the baby with the bath water," or to dismiss all mutually exclusive applications which were filed in accordance with the Commission's rules, just to rid itself of any potentially speculative filings. While discouraging speculative filings is a laudable goal to which Ameritech would lend its strong support, doing so at the expense of dozens of sincere applicants, including Ameritech, that followed the rules and have every intent of providing useful services to the public would be unlawful and drastically unfair. Ameritech believes the Commission can largely solve its problem with speculative filings by strictly enforcing the policies stated in its *Public Notice* of September 16, 1994.[13/] Moreover, as indicated the comments of TGI,[14/] the Commission can strictly enforce its current construction and usage requirements to this end. Companies that fail to meet these reasonable benchmarks without justification would forfeit their licenses.

a. The Commission Should Dismiss All Multiple Channel Applications and Enforce Vigorously its One-to-a-Customer Policy With Regard to Pending Applications

Ameritech continues to believe the first step in clearing out the "clutter" of speculative applications, after processing all minor amendments filed before the freeze, is the immediate dismissal of any applications which still contain multiple channel requests or which did not specify a particular channel pair. Thereafter, the Commission should enforce vigorously its one-to-a-customer policy with regard to these channels and applications for a

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[12/] *Id.*

[13/] *See Public Notice*, Mimeo No. 44787 (released September 16, 1994) "*Policy Statement.*"

[14/] Comments of TGI at 5.

licensee's second, third, and sometimes fourth channel pair should be dismissed. This would be consistent with the letter and spirit of the Commission's September 1994 *Policy Statement*, and would provide a defensible position in the event of subsequent litigation.

Similar proposals were advanced by TGI, which advocated a "recapture plan" of very strict measures designed to discourage speculators and maximize use of the 37-39 GHz channels.[15/] However, Ameritech believes that TGI's proposals may go too far and impose penalties which might be considered confiscatory. While Ameritech supports vigorous enforcement of the Commission's policies and rules, TGI's proposal may lead to a spate of litigation from existing licensees in the event they are later stripped of their licenses.

b. Giving Mutually Exclusive Applicants an Opportunity to Resolve Their Conflicts Voluntarily Would Help Eliminate Daisy-Chains

After dismissing all of the pending 39 GHz applications which do not comply with the September 1994 *Policy Statement*, the Commission should afford mutually exclusive applicants the opportunity to resolve their conflicts voluntarily. The significant number of applications the Commission has granted thus far in the 39 GHz point-to-point microwave service, in spite of widespread mutual exclusivity, clearly demonstrates that such agreements are feasible. Such a solution would best serve the public interest because it is by far the fastest way to distribute licenses in the 39 GHz band, and thereby facilitate service in markets where there is a current demand for these channels. As described above, the settlement process is also mandated by the Commission's statutory auction authority.

Ameritech has observed that most of the commenters addressing this issue believe the FCC should give existing mutually exclusive applicants a limited period of time (*i.e.* from

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[15/] Comments of TGI at 5-7.

60 days to 6 months after a *Report and Order* in this proceeding) to file amendments and resolve their conflicts. Like AT&T,[16] Ameritech believes that 120 days would an appropriate time frame for mutually exclusive applicants to negotiate service area modifications and prepare its amendments. This will not place any significant burdens on the Commission's resources and, as AT&T notes, "may result in A and B block PCS licensees being able to deploy broadband PCS services at the earliest possible time."[17] This 120-day time frame would not delay even the most ambitious competitive bidding schedule, if the Commission still determines that 39 GHz overlay auctions are appropriate and in the public interest.

Furthermore, as suggested by Commco,[18] the Commission should allow mutually exclusive applicants to have access to the Commission's database (through use of the Internet or otherwise) to promote an efficient and fair settlement process. Ameritech believes that non-discriminatory access to an authoritative database will lead to a rapid and orderly clearing of mutually-exclusive applications in the 39 GHz band.

A number of commenters believe that, after the Commission has finished processing 39 GHz amendments, there will likely remain little or no desirable spectrum for any subsequent overlay auction of the 39 GHz channels.[19] Therefore, the Commission should consider confining auctions to the new 37 GHz allocations. Any remaining 39 GHz spectrum could be available for licensing of point-to-point paths.

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[16] Comments of AT&T at 13.

[17] *Id.*

[18] Comments of Commco at 3.

[19] *See, e.g.* Comments of Bachow at 6, Comments of No Wire at 6.

III. BUILD-OUT AND PERFORMANCE REQUIREMENTS

As noted above, Ameritech believes that rigorous build-out and performance requirements are an appropriate, as well as legally defensible, means of preventing speculators and ensuring that legitimate use is being made of the licensed spectrum. However, due to the short propagation distances available using the 37 - 40 GHz frequencies, and due to limitations caused by commonplace geographic and atmospheric conditions, these short-haul microwave channels often do not provide an ideal or even a workable solution (in terms of reliability or cost) for a user's point-to-point communications needs. Thus, strict build-out and performance guidelines, that are applicable to *all* service areas, would be inappropriate and lead to the anomalous result of promoting *inefficient* use of a valuable resource.

Accordingly, Ameritech supports the comments of TIA and others that advocate a flexible build-out standard based upon service area population or population density.[20/] The flexible standard would allow licensees to respond to changing market conditions and priorities, rather than imposing upon them arbitrary criteria which could force construction of high-capacity short-haul microwave channels in areas where there is no demand. Technical, topographic, environmental, financial, business, and other factors should continue to dictate the use of different types of microwave links, as well as non-RF solutions. Moreover, adopting build-out and performance standards that are tailored to the type of service being offered (i.e. PCS) would arbitrarily favor certain uses of the 37-39 GHz spectrum over others. As one commenter has noted, "[t]he Commission should not base its regulatory structure on the assumption or desire that the 37-39 GHz band will be used primarily for any one category of use."[21/]

[20/] Comments of TIA at 20.

[21/] Comments of Bachow at 8.

IV. AMERITECH OPPOSES ANY "GIVE AWAY" OR SET-ASIDE OF 37 GHz BTA CHANNELS FOR PCS OR OTHER CMRS LICENSEES

Ameritech opposes AT&T and other commenters that support a "give away" or set-aside of 37 GHz BTA channels for PCS or other CMRS licensees.[22/] As previously mentioned, many factors, other than "immediate availability" are considered by a user that wishes to create an efficient and reliable communications path. The Commission should, instead, allow wide-open eligibility for *all* 37 GHz channels that it chooses to license using competitive bidding methodology. This will allow market principles, rather than regulatory assumptions, to determine the most efficient use of these high-capacity short-haul channels.

Ameritech is licensed for broadband PCS and cellular systems which cumulatively cover nearly all of its local exchange telephone service area. Based on an analysis of its backbone and backhaul needs, and current technical limitations in the 37 - 39 GHz bands, Ameritech believes that few 37 GHz channels, if any, will be needed by broadband PCS operators in most BTA or MTA service areas, and likely no channels will be needed by most cellular operations (which have largely constructed their backbone/backhaul using other channels or non-RF solutions) or SMR licensees (which lack the need for the tremendous capacity of a 37 GHz channel pair). The shorter propagation characteristics of the 37 GHz band may prove unsuitable for PCS, in all but the most urban areas. This is especially true since the Commission increased the permitted power for PCS in GN Docket No. 90-314, to allow operations with approximately the same power levels as cellular systems.

Ameritech's analysis in this regard is supported by the surprising lack of participation in the initial stages of this proceeding by PCS and other CMRS licensees. By Ameritech's

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[22/] Comments of AT&T at 5.

count, initial comments were submitted by just five broadband PCS licensees[23], of which four are also cellular licensees or affiliates of cellular licensees,[24] and *no* SMR licensees or other CMRS licensees. As for the other CMRS participants, Ameritech believes each has strong incentives to overestimate their actual demand for these channels, just to ensure their control over vast amounts of virgin spectrum. The Commission should carefully consider this low level of interest in initial comments from CMRS licensees and affiliates before it creates a significant set aside of 37 GHz channels for PCS and/or CMRS licensees.

Some commenters have even taken the position that PCS licensees deserve special consideration from the Commission because they obtained their licenses through competitive bidding and "have paid enough already" for their systems. However, any auction participant following basic tenants of due diligence would have factored the costs of obtaining backhaul and backbone links, whether microwave or fiber-optic, into their valuation of a license and planned their bidding strategy accordingly. Moreover, any cash-poor licensees that have become a successful high bidder at auction are now asset-rich. These licensees should be able to finance the additional construction costs, especially if the Commission allows licensees to use the 37 GHz channels as they see fit, including other revenue generating uses.

V. THE FCC'S CHANNEL PLAN SHOULD RESERVE A NUMBER OF 37 GHz CHANNELS FOR POINT-TO-POINT LICENSING UNDER PART 101 RULES

Since commenters filed their initial comments in this proceeding, the Commission has released its *Report and Order* combining its Part 21 and Part 94 rules into Part 101, which contains uniform rules for the public and private fixed microwave services.

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[23] Ameritech, AT&T, GTE, TDS, and Pacific Bell Mobile Services (PMBS).

[24] Ameritech, AT&T, GTE, and TDS.

The Commission's Part 101 rules provide streamlined procedures for applicants to construct and operate point-to-point microwave facilities immediately upon filing an application, conducting frequency coordination, and paying a reasonable FCC filing fee.[25/] Ameritech believes these significant improvements in the processing of fixed microwave applications may provide certain broadband PCS and CMRS licensees that have limited need for 37 GHz facilities, with an answer to their Hobson's choice of whether or not to participate in costly auctions for wide-area licenses. From this standpoint, setting aside a number of the 37 GHz channels for point-to-point licensing, as TIA and other commenters have proposed,[26/] would appear to make sense.

Ameritech recognizes that the more channels the FCC sets aside for licensing in accordance with Part 101 rules, the fewer channels it will have available to generate auction revenues for the U.S. Treasury. Nevertheless, the public interest must be gauged in terms of spectrum efficiency and service to the public, rather than strictly in terms of dollars.[27/]

VII. TECHNICAL AND OPERATIONAL RULES

The record reflects widespread support among the commenters that the Commission's Rules should afford licensees in both the 37 GHz and 39 GHz bands maximum technical and operational flexibility within their licensed service areas, so long as they do not cause interference to adjacent channel licensees or co-channel licensees in adjacent BTAs.

Ameritech agrees with Bachow that the Commission's "strong emphasis on CMRS support infrastructure is misplaced and that the public interest will be better served by a

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[25/] *See* Section 101.31 of the Commission's Rules.

[26/] Comments of TIA at 4, Comments of Commsearch at 4.

[27/] *See* 47 U.S.C. § 309(j)(7).

broad and flexible approach to regulating permissible uses in [the 37-39 GHz] band."[28] As Bachow aptly states, "this rule making should be seized as a golden opportunity for the development of an entirely new variety of local wireless industry."[29] Ameritech believes that the best way for the Commission to promote this opportunity, for CMRS licensees and entrepreneurs alike, is by endorsing the industry's call for maximum technical and operational flexibility in the Commission's rules.

VIII. SPECTRUM DISAGGREGATION AND GEOGRAPHIC PARTITIONING

Consistent with its position on technical and operational flexibility within the Commission's Rules, Ameritech also supports allowing 37 GHz licensees to disaggregate spectrum and partition licensed service areas freely. Ameritech believes that by granting such rights to licensees, the Commission will promote the most efficient use of a valuable resource. Licensees that are not using their 50 MHz paired channels to full capacity (or over their entire licensed service area) will be able to transfer a portion of their spectrum rights and other users will benefit from the ability to control their own facilities.

Moreover, as AT&T specifically observes, "[a]llowing 37 GHz band licensees to disaggregate spectrum and partition licensed service areas also serves to ensure that small entities, including but not limited to designated entities and rural telcos, will be able to obtain 37 GHz band spectrum for more narrowly defined needs."[30] The Commission should therefore allow spectrum disaggregation and geographic license partitioning because such rights are consistent with the Commission's obligation to "promot[e] economic opportunity and competition... by disseminating licenses among a wide variety of applicants."[31]

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[28] Comments of Bachow at 7.

[29] *Id.*

[30] Comments of AT&T at 10.

[31] 47 U.S.C. § 309(j)(3)(B).

CONCLUSION

WHEREFORE, in light of the foregoing, Ameritech respectfully requests that the Commission act in accordance with the preceding comments.

Respectfully Submitted,

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